

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC,

Debtor.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

October 15, 2009

2:02 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1
2 HEARING re Motion of debtor to modify the September 20, 2008
3 sale order and granting other relief.

4
5 HEARING re Motion of the trustee for relief pursuant to the
6 sale orders or, alternatively, for certain limited relief under
7 Rule 60(b).

8
9 HEARING re Motion of official committee of unsecured creditors
10 of Lehman Brothers Holdings Inc., authorizing and approving (a)
11 sale of purchased assets free and clear of liens and other
12 interests and (b) assumption and assignment of executory
13 contracts and unexpired leases dated September 20, 2008 (and
14 related SIPA sale order) and joinder in debtor's and SIPA
15 trustee's motions for an order under Rule 60(b) to modify sale
16 order.

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25 Transcribed by: Penina Wolicki

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ALSO PRESENT:

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. I have a
3 correspondence that came in overnight from Quinn Emanuel, the
4 joint submission from Boise Schiller -- and from Boise
5 Schiller. Somebody's on the line with an open mike. Please
6 mute it. I'm assuming nobody who's on the telephone is going
7 to be speaking. Why don't I take appearances from those who
8 are going to be participating in at least the discussion of the
9 areas of disagreement.

10 MR. GAFFEY: Robert Gaffey from Jones Day, Your Honor,
11 special counsel to the debtor, Lehman Brothers Holdings Inc.

12 MR. MAGUIRE: Bill Maguire, Your Honor, of Hughes
13 Hubbard & Reed, for the SIPA trustee.

14 MR. TECCE: James Tecce, Your Honor, Quinn Emanuel,
15 for the creditors' committee.

16 MR. HUME: Good afternoon, Your Honor. Hamish Hume
17 from Boise Schiller & Flexner, for Barclays.

18 THE COURT: Okay. I take it everybody else is just an
19 interest -- not just, but an interested observer.

20 First of all, I'm pleased that the parties have been
21 able to narrow their differences regarding procedure so
22 dramatically, and I think that the letters reflect that you've
23 been doing some good work over the last couple of weeks. It
24 probably makes sense for me just to understand the positions of
25 the parties relative to the areas of principal disagreement.

1 And we should also deal with all areas of disagreement, not
2 just the principal ones. The one that I'd like to start with
3 is whether we need an evidentiary hearing at the get-go.

4 MR. GAFFEY: Your Honor, if it please the Court, I'll
5 proceed on that. I should quickly tell you, we're down to two
6 issues. Those two date issues in the letters have been
7 resolved by the parties --

8 THE COURT: Oh, good.

9 MR. GAFFEY: -- in the last few minutes, so.

10 THE COURT: And the question of the evidentiary
11 hearing remains an issue?

12 MR. GAFFEY: The evidentiary hearing, Your Honor,
13 where the parties are apart and where the movants are, are as
14 follows. In the two proposals that are before Your Honor about
15 how to proceed, it is the movants' view that the most efficient
16 way to proceed, both in terms of the Court's resources, the
17 parties resources, and assessing what facts, if any, need to be
18 subject to an evidentiary hearing; our proposal is that after
19 full submission of the papers -- and we have an agreed schedule
20 for that -- and argument of the motions -- and we have an
21 agreed date for that if it suits the Court's calendar -- the
22 Court would then have a fully briefed motion, including, under
23 the procedure that we've agreed upon, the submission by both
24 sides of our view as to facts that cannot reasonably be
25 disputed and Barclay's ability to put in a counter-statement to

1 that effect.

2 That the Court should consider the motion, hear
3 argument on the motion and decide the motion, to the extent
4 that it can on the written record, which is voluminous; but in
5 large part based on testimony, and much of that testimony, in
6 our view, based on testimony of Barclay's employees. The Court
7 would then be in a position to determine if a hearing is needed
8 at all. And it is our view that there are issues in this case
9 that can be decided without a hearing. What it is the Court
10 would need evidence on; what issues are genuinely, legitimately
11 in dispute; what are not?

12 The alternative, offered by Barclays, is, as I
13 understand it, to see the Court on the 29th -- we're in
14 agreement on that -- after all the briefing is done; to have
15 either a status conference or an argument; but to immediately
16 say now that there'll be a hearing four or five days later.
17 Now the problem from our perspective with that proposal is
18 that's a plan for an unfocused hearing. We would have to try
19 everything. And our view is, on the record that's submitted by
20 the movants, each of our motions are well-supported in the
21 sense that there's a lot of evidence. I'm not arguing the
22 weight of that evidence.

23 Barclays will have opportunity to take discovery under
24 our proposed plan; put in equally supported papers. We will
25 put into the Court these competing factual statements where we

1 think we'll be able to demonstrate a large number, if not all
2 of the dispositive facts, cannot genuinely be disputed. And
3 the Court would then be able, if it needed a hearing at all, to
4 have one in the five days that both parties -- both sides
5 agree -- have asked the Court to set aside. It would be a
6 focused hearing and we'd know what proof we wanted. We'd know
7 what proof Your Honor wanted to hear.

8 It strikes us as the most efficient way to proceed.
9 And that's why, in our paragraph 13, that's what we have
10 offered. I'm prepared to go to the other issue, too, Your
11 Honor, unless you just want to hear from --

12 THE COURT: Why don't we do it one at a time.

13 MR. GAFFEY: Okay. Then that's where we stand on the
14 evidentiary hearing, Judge.

15 THE COURT: Okay. Mr. Hume?

16 MR. HUME: Thank you, Your Honor. It may help to
17 just, if I could, emphasize for the Court, Barclays' desire for
18 a prompt resolution of this, consistent with creating a full
19 record. I think the principal disagreement as -- we disagree
20 about the realism of deciding these motions on an oral
21 argument.

22 They have submitted 170 pages of briefing, thousands
23 of pages of exhibits. And we believe they have grossly
24 distorted the facts of what happened in September 2008 in this
25 transaction in numerous ways. We do not want the Court to

1 decide those motions based on snippets of depositions and what
2 we believe are mischaracterizations of documents and
3 depositions. We would like the Court to hear directly from the
4 people involved and to hear from the negotiators how the deal
5 changed; to hear from the people involved about the incredible
6 uncertainty in the financial markets.

7 Their motions play, with respect, fast and loose with
8 the numbers and the values of the assets involved. This is a
9 week in the financial markets that Your Honor will remember
10 well and that the witnesses would tell Your Honor and explain
11 in graphic detail was probably one of the worst weeks in the
12 financial markets since the Great Depression. And the assets
13 Barclays was being asked to acquire, asked in part by the
14 Federal Reserve through the repo transaction, included assets
15 that Your Honor will remember reading about, mortgage-backed
16 securities, collateralized debt obligations, collateralized
17 loan obligations, other assets that were illiquid, not traded
18 at all or very thinly traded, even corporate bonds and muni
19 bonds were not heavily traded that week and were illiquid.

20 In that context, the parties made a good-faith effort
21 to value the assets, to determine what was there and available
22 to be transferred and what it was worth. And we think it is
23 totally inappropriate to try to decide the extraordinary claims
24 for relief that the motions and the movants have submitted
25 without hearing from the witnesses directly.

1 Now, to be sure, it's ironic, because we believe the
2 legal standard for what these motions seek to accomplish is
3 exceptionally high. It's well-established, in an ordinary Rule
4 60 context, that courts are reluctant to disturb the finality
5 of orders and only do so in extraordinary circumstances. That
6 is especially true in the context of an attack upon a sale out
7 of bankruptcy under Section 363, because of the interest in
8 encouraging bidders to make such sales.

9 So for those policy reasons and legal reasons, there
10 is a high hurdle. And they're trying to clear that high hurdle
11 with an incredibly fact-intensive submission that we heavily
12 dispute. We dispute the way they use numbers; we dispute their
13 valuations; we dispute the deposition testimony they present to
14 you. And we think we could probably win, as a matter of law,
15 but we want a result as promptly as possible, because Barclays
16 is owed assets under the purchase agreement that have an
17 approximate value somewhere in the region of three billion
18 dollars, still not delivered, that is owed under the purchase
19 contract that their clients signed and agreed to.

20 Your Honor, we think they are trying to avoid their
21 obligations under that contract and are asking this Court to
22 nullify that contract and impose a different contract that
23 Barclays never would have agreed to. It is extraordinary
24 relief that they are seeking. They agreed -- Lehman agreed to
25 the contract. The Lehman lawyers, Weil Gotshal, helped

1 negotiate the contract. They filed the contract in court
2 publicly after the closing. They defended the contract on
3 appeal. The appeal wasn't even decided until March. They know
4 what the contract says. They were represented by the best --
5 among the best bankruptcy lawyers in the country, Weil Gotshal;
6 had some of the top financial advisors in the county in Lazard.

7 We believe Lazard and Weil will confirm that everyone
8 understood the nature of the deal, that it involved a
9 collection of assets. There was no certainty to the valuation.
10 There was no valuation cap on the assets that were transferred.
11 There was an effort to come up with a deal that made sense to
12 buy this broker dealer in that tumultuous week.

13 And again, we think we could win as a matter of law,
14 but we don't want to waste time trying to do that and then
15 understanding that the Court, as you have indicated earlier,
16 would like to understand the full picture of what happened. So
17 we want you to understand that. We think it should tell you
18 something that the movants, the plaintiffs in this context,
19 don't want you to have an evidentiary hearing.

20 We think we ought to have our limited discovery; have
21 our fair opportunity to gather the facts; come before Your
22 Honor, set aside three or four days, maybe five days; come up
23 with the six to eight key people who were involved in
24 negotiating the deal, who were involved in assessing the assets
25 and the values of the assets, which is such a point of

1 contention here; explain to you what happened; explain to you
2 that the deal was understood, how to came to be, how it changed
3 during the week; and what the valuations ultimately turned out
4 to be and how long it took Barclays -- months -- to actually
5 value these assets that they received in the deal. We just
6 think it's the more efficient way to resolve this is to present
7 the evidence to you directly.

8 THE COURT: Let me ask you a question which is
9 prompted both by your remarks and by my review of the proposed
10 orders that have been submitted. There's a provision calling
11 for Barclays and the movants to identify areas of agreement, if
12 you will, as to the record, in which there'll be a statement of
13 uncontested facts. Let's just say, for the sake of argument,
14 because that's something to happen in the future, presumably
15 after discovery has taken place, and something we don't know
16 anything about yet. Let's just say that there is a stipulation
17 of uncontested facts that is sufficient to support your view
18 that as a matter of law you should win. Why on earth would you
19 be arguing now for an evidentiary hearing?

20 MR. HUME: Because, Your Honor, we believe, at the end
21 of the day, that's unlikely to happen. They -- we have sat
22 through three months of discovery with them and depositions of
23 the roughly thirty senior-most executives from Barclays and
24 former Lehman executives. We've read their submissions. They
25 are distorting the facts. To get the relief they want, they

1 have to twist the facts. They're going to put their spin on
2 the facts no matter what.

3 So, yes, our brief -- our opposition, I suspect, will
4 argue, for the following three or four legal reasons, the Court
5 can deny the motions on very limited undisputed facts.
6 Estoppel on the fact of what they argued on appeal. There are
7 legal arguments -- they are charged with the knowledge of the
8 very employees they are getting the information from. So there
9 will be legal arguments that would allow the Court to deny the
10 motions.

11 I think the practical answer to the Court's question
12 is, we don't want to delay the resolution by having a long and
13 elaborate oral argument with a long delay to read hundreds of
14 pages of briefing and volumes of appendices of exhibits, a
15 burden on the Court, rather than to come in practically and
16 explain everything in the way, as we understand it, contested
17 matters are frequently resolved, just to present directly the
18 evidence to the Court. We think it's more efficient, more
19 likely to lead to a prompt resolution.

20 THE COURT: Okay. I understand your position. Any
21 further response?

22 MR. GAFFEY: Just very briefly, Your Honor. I think
23 Your Honor hit the right point with respect to the submission
24 of undisputed facts. We are not -- we are not ruling out the
25 possibility that Your Honor will find that an evidentiary

1 hearing might be necessary. What we are doing is proposing a
2 method to say what it really should be about.

3 Much of this case is about disclosure to the Court.
4 And that's not a bad example of what I'm talking about with
5 respect to factual issues that we really don't see can be
6 genuinely disputed. The best evidence of what the Court was
7 told is the record of what took place before the Court. And to
8 the extent the Court had the deal described to it in a certain
9 way on Friday the 19th of September and the deal differed from
10 that, and we're able to show that, that probably doesn't need
11 an evidentiary hearing.

12 The issue of whether the Court signed the
13 clarification letter -- and I take note that Mr. Hume was very
14 careful to say it was filed after the deal, but not that the
15 clarification letter was approved. We think that that is an
16 issue that the Court could, on a full record, a full written
17 record, make a determination about. And it is a gating issue.
18 It is a critical predicate issue to a lot of what follows in
19 the 60(b) motion.

20 Now, it may well be that after looking at that issue,
21 Your Honor might need proof on a subsequent issue. For
22 example, if Your Honor were to find that the clarification
23 letter, which was never submitted for the Court's approval and
24 was merely filed on the 22nd of September after the transaction
25 closed, on its face, materially differed from the sale order,

1 and we think there's a way that Your Honor could easily get
2 there, then the only thing Your Honor would need proof on --
3 and Your Honor could find that, for example, by taking note of
4 the fact that the definition of purchased assets was changed in
5 a transaction that was an asset purchase agreement -- then it
6 may well be that as Mr. Hume suggests, Your Honor might need
7 some proof about the value of the assets that were wrongfully
8 transferred. But we wouldn't have to go through testimony
9 about the clarification letter and how it was negotiated.

10 We have put in the record and Barclays will have and
11 is free to put in their own version of the record, the various
12 drafts of the clarification letter. Much can be determined
13 simply by that chain of written events. There's no need for a
14 hearing on that.

15 Now, again, I'm not saying no hearing ever will be
16 necessary. One may be necessary. But it seems to us, it makes
17 sense to proceed as Your Honor is suggesting with regard to the
18 attempt to reach a set of facts about which either the parties
19 do agree or Barclays cannot reasonably disagree, and if a
20 hearing is needed, have it about the rest.

21 As for the suggestion that a hearing will speed
22 everything up, as Mr. Hume says, we filed -- if it totals 170
23 pages, it totals 170 pages. Whether we have a hearing or not,
24 Your Honor is going to read the papers.

25 THE COURT: Yes, I am.

1 MR. GAFFEY: Of course you are. So that's not a time
2 saver. I would suggest, though, that a day of argument to go
3 over that record, to argue that motion, which might save weeks
4 of hearing time, is a time saver. It saves resources of the
5 Court and it saves resources of the parties.

6 So for that reason, Your Honor, I think our suggestion
7 of an argument on the motion, a decision on the motion at
8 whatever pace Your Honor decides, and if a hearing is
9 necessary, a hearing after that. If Your Honor were to say to
10 us even at the oral argument, look, I'm seeing these three or
11 four issues about which I know I'm going to need a hearing, we
12 can start getting witnesses ready right then. We can start
13 marking those exhibits right then.

14 The alternative, though, is to try and figure out what
15 really are the issues that need to be disputed, get everything
16 marked, get every witness ready, get ready for a hearing that
17 has no shape yet. There are no pleadings in this case. We
18 haven't even seen Barclays' opposition yet. What Mr. Hume had
19 told you today is frankly the most detail I've heard yet. And
20 that's fine. His time hasn't come to oppose the motion. But
21 by the same token, the time is not here today to say sure, we
22 can try this, we can have a hearing on this. The better course
23 is to determine what facts are actually in dispute and if
24 evidence is needed on it -- because they will be factual
25 issues -- then determine the scope of the hearing after an

1 argument and a decision on the 60(b) motion.

2 THE COURT: Okay. Do you have something else, Mr.
3 Hume?

4 MR. HUME: Very briefly, if I may, Your Honor. If I
5 may make a practical suggestion. What we really would like to
6 resist, given the Court's busy docket, is that we brief
7 everything, have an argument, and we find ourselves next
8 spring, knowing we're going to need an evidentiary hearing, and
9 looking out on the Court's calendar for when one can be
10 scheduled that will have to be months later. We would like
11 time set aside now so that we can resolve this promptly. That
12 is really a principal concern of Barclays that this not delay.

13 I also would say to the practical point of an
14 unfocused hearing. We have, even under our proposal, several
15 months between now and April for the parties to work together
16 just as we have, to narrow the issues through this -- whatever
17 procedure they want to propose that will be presented to Your
18 Honor, just as they always are in a contested matter.

19 MR. GAFFEY: Very quickly --

20 THE COURT: Apparently it's not the last word.

21 MR. GAFFEY: It's a very short last word. In our
22 paragraph 13, Your Honor, the one that deals with this issue,
23 we've let a blank for the Court to fill in to tentatively set a
24 hearing date now. If Your Honor wanted to estimate how long it
25 would take to review the papers, hear argument, issue a

1 decision and set us down for a date now, so everybody has some
2 certainty about what we're aiming at, that makes complete
3 sense.

4 THE COURT: All right. This is an unusual argument.
5 I would analogize it to the procedure that sometimes takes
6 place in adversary proceedings where one party says that there
7 should be briefing on a summary judgment and the other party
8 says there are genuine issues of material fact, and that would
9 be wasteful.

10 We're fairly early in the process of developing the
11 record that will be the basis for the stipulation of
12 uncontested facts or the list of uncontested facts that might
13 become the basis for argument on the 60(b) motions. And I
14 think it's difficult and hazardous to establish in October,
15 procedures that should apply six months from now.

16 My inclination is to give you what amounts to a
17 hybrid. I think that it makes sense for the parties to
18 endeavor to narrow the issues, to identify the areas of
19 agreement, if any, and those areas that are relevant to the
20 issue that may require an evidentiary hearing. That's
21 ordinary-course trial preparation. In terms of Mr. Hume's
22 suggestion, which he couches in terms of the desire to avoid
23 delay, I think it does make sense to reserve time now for an
24 evidentiary hearing. Whether that's five days or ten days, I
25 don't know. But taking Mr. Hume at his word that it's four or

1 five days, let's assume it's five, and let's reserve that time.
2 If the time isn't needed, I'll take a vacation. If the time is
3 needed, it will be available.

4 Importantly, I think that both sides appear to
5 acknowledge that it is at least possible if not probable and
6 foreseeable that there will be a need for some evidence to be
7 developed. Taking Mr. Hume's argument, which to some extent
8 goes to the merits, I gather that Barclays would prefer, to the
9 greatest extent possible, not to have me rely upon a cold
10 record, but rather to have me evaluate the credibility of
11 eyewitnesses to history who would be here in court and who
12 would be describing how they experienced the events of
13 September of 2008. Speaking for myself, to the extent that I
14 have a personal preference, I would be interested in hearing
15 what live witnesses have to say, to the extent I can't decide
16 something on the basis of stipulated facts or a record.

17 So here's how I think it makes sense to resolve this.
18 And I'll hear what you have to say after I've said my piece. I
19 think that your proposed orders should reflect, as Mr. Hume has
20 proposed, a provision for an evidentiary hearing, and we'll
21 figure out a five-day period that works for the parties and for
22 the Court. My courtroom deputy will assist in that. Just
23 because it's reserved, however, doesn't mean that it will
24 happen. Because I will at least leave open the possibility
25 that following the completion of discovery and the development

1 of papers that I'm sure will be well-crafted and thoughtful,
2 following argument, I may well be able to decide this on the
3 basis of the arguments presented and the stipulated record. So
4 without prejudging the outcome, we will at least have set aside
5 and reserved sufficient time to deal with those areas that are
6 not susceptible to summary disposition. I think that works.

7 If you think it doesn't work, let me know why you
8 think it needs to be adjusted. But I think that makes sense to
9 me.

10 MR. GAFFEY: It's fine with us, Your Honor. All I
11 would ask is that the time period between the date of the oral
12 argument and the hearing be set at something like thirty days,
13 not at four or five, because we'll have a sense after the
14 argument of particularly what witnesses might be needed, what
15 evidence needs to be put in, what experts might have to
16 actually testify. There's -- as a -- if we set it for -- if
17 we're going to argue on the 29th, which both parties have
18 proposed, and Your Honor were to set it down to -- would have
19 reserved the five days for early April, if we went ahead with
20 that, we still don't have the idea of how to frame it. With
21 thirty days, we could do that, and we could get all the interim
22 work done of exchanging exhibits and identifying witnesses and
23 the like.

24 THE COURT: That to me does not seem unreasonable.
25 And let me also make another observation based upon some recent

1 experience. Depending upon the issues to be tried, five days
2 may turn out to be optimistically brief, because the timing
3 associated with the trial will depend to a great extent upon
4 cross examination and argument associated with the evidence at
5 the conclusion of the evidence. If the parties, in good faith,
6 believe that this can be concluded in five days, that's great,
7 but the last time various skilled lawyers told me that the
8 trial would take five days, it took nineteen.

9 So if you think you really can get it done in five,
10 that's fine. If you think you legitimately should reserve more
11 time, do it now.

12 Okay. That's that issue. As far as the thirty days,
13 I agree that there should be a lag between the -- whether it's
14 thirty days or twenty days, is a matter of indifference to
15 me -- but there should be a lag of some sufficient time for the
16 parties to prepare for what will be an identified evidentiary
17 hearing, the contours of which cannot really be determined
18 until we get to the point of seeing what's in the basket of
19 issues to be decided.

20 MR. GAFFEY: I know I said it was the last word, Your
21 Honor, but I think I can get us to a final order that we just
22 have to fill in the date. If we remove from our paragraph 13
23 the sentence, "The parties shall be prepared to conduct an
24 evidentiary hearing on the assertions made in Rule 60 motions,
25 beginning thirty days after a decision is issued on the Rule 60

1 motions," and just fill in the next sentence with, the Court
2 shall schedule five days in, what I suggest is early May, to
3 thirty-one, thirty-two days.

4 THE COURT: Look, I don't want it to be within thirty
5 days after the Court has issued a decision.

6 MR. GAFFEY: No, no. That's what I'm proposing to
7 strike from our paragraph. And then that would accommodate
8 what Your Honor has said is preferable.

9 THE COURT: Okay, fine.

10 MR. GAFFEY: Okay. I think Mr. Tecce wants to be
11 heard on the other issue before Your Honor. He's spent a
12 little more time on it than I have.

13 MR. TECCE: If Your Honor is prepared to move to the
14 second issue.

15 THE COURT: The second issue is discovery.

16 MR. GAFFEY: It's the scheduling of motions regarding
17 discovery.

18 THE COURT: Motions to compel.

19 MR. GAFFEY: Yes.

20 MR. TECCE: Good afternoon, Your Honor. For the
21 record, James Tecce of Quinn Emanuel on behalf of the
22 creditors' committee.

23 The issue, Your Honor, with respect to motions to
24 compel, Barclays' proposal would contemplate and expedited
25 procedure for motions to compel the production of documents and

1 discovery. And as a general proposition, we don't have an
2 objection to that. The issue is, with respect to a specific
3 area of discovery that Barclays is seeking and our position
4 that expedited discovery, as defined by Barclays, will not
5 work.

6 Specifically, Your Honor, Barclays has served wide
7 ranging document requests on attorneys and advisors in these
8 cases. They have served document requests on Milbank Tweed,
9 counsel to the creditors' committee; on Weil Gotshal; on
10 Simpson Thatcher and Bartlett; and on Houlihan Lokey. These
11 are advisors, not the parties themselves. And it is Barclays'
12 assertion that certain arguments raised in the Rule 60(b)
13 motions have constituted a waiver of the attorney-client
14 privilege.

15 Speaking with respect to the committee, it's their
16 position that arguments that we raise waive attorney-client
17 privilege between the creditors' committee and its counsel and
18 work product privileges between the creditors' committee and
19 its financial advisors. And as a consequence of that, Barclays
20 is entitled to discover all attorney-client communications, all
21 work product, etcetera.

22 The committee does not agree with that position and
23 will not agree with that position. And we actually advised
24 Barclays of that definitively earlier this week. The question
25 is whether or not, at the time -- the question is when this

1 issue, to the extent that it cannot be resolved -- and we're
2 not optimistic that it can be resolved -- the question is when
3 and how to put this issue to the Court for resolution. And the
4 question is whether or not promptly after written responses and
5 objections are filed, the issue can be immediately submitted to
6 the Court or whether or not the parties should first produce
7 documents, identify documents that are withheld on the basis of
8 privilege, and provide privilege logs, and then at that point
9 in time, with respect to privilege disputes, take any disputes
10 to the Court that exist.

11 Otherwise, the committee is placed in a very difficult
12 position of litigating the question of whether or not its
13 papers waived attorney-client privilege in the abstract. And
14 the Court is basically issuing an advisory opinion without
15 having seen a single document that has been withheld on the
16 basis of privilege, really in a vacuum. So our position is
17 that nothing in this order should be deemed to authorize a
18 motion to compel until the documents have been produced by
19 parties and a privilege log has been provided by the creditors'
20 committee.

21 If Your Honor has any questions, that's the dispute as
22 we see it.

23 THE COURT: Well, I don't have any questions yet. I
24 want to hear Mr. Hume's response.

25 MR. HUME: Thank you, Your Honor. There may be some

1 confusion about this. Our provision in the proposed schedule
2 was actually motivated by something other than this privilege
3 dispute, which I'll come back to. We, as Your Honor knows,
4 Barclays, and as I've said, would like to move as expeditiously
5 as possible. We recognize the practical constraints on that.
6 We adjusted from our original schedule to, I think, what we
7 believe are quite generous document production deadlines.
8 November 16th for the first round, and we had a second request
9 that's gone out; we're giving them now until December the 8th
10 for that, like six or seven weeks.

11 But the order says, and we both agreed to this, it's a
12 rolling production. What happened this week was we were told
13 by counsel for the debtor that for documents that we've
14 requested after September 30th, he thinks they're irrelevant.
15 Nothing to do with privilege, just that the documents --
16 they're not going to produce. So what do we have to do? Wait
17 until December 8th to get -- learn that they're not producing
18 those documents, or get a few but basically nothing, and then
19 move to compel?

20 We think the written objection should say that we've
21 all agreed will be served promptly. It should say here's your
22 request, here's what we agreed to do, here's what we don't,
23 here's what we're going to produce. And we may agree, we may
24 meet and confer and compromise, or we may say okay, we don't
25 agree, we're going to move to compel. And we just want to be

1 able to do that now, and yes, on an expedited basis, so that we
2 can stick to the schedule we've worked so hard to frame, and
3 not end up getting all the documents in February.

4 THE COURT: Well, let me understand how this works in
5 your estimation in a practical setting. Let's just say that no
6 documents have been turned over, but there is a broad-based
7 assertion in an objection to the turning over of documents that
8 are a certain category of identified documents, are not
9 discoverable on account of joint defense privilege or some
10 other doctrine. You would then be proposing that instead of
11 waiting for production to run its course, that you would have
12 the ability to trigger a meet and confer session, see if you
13 can resolve it, and to the extent that you can't, request a
14 discovery conference, leading ultimately to a motion to compel.
15 Is that correct?

16 MR. HUME: That is correct. I do think about it
17 slightly differently for the privilege issue and the relevance
18 or other undue burden objections, whatever else they may make.

19 For privilege, it is a broad issue that we've raised
20 on whether their papers waive the privilege. We have reached
21 an agreement, I'm happy to announce, with the debtor, on a
22 waiver of privilege for the September weeks through September
23 30th of the deal negotiations. We have a signed agreement. So
24 we're not pressing that. For now, we reserved rights on later
25 dates.

1 We'll be discussing -- we think the issue is ripe on
2 privilege now, because we've had letters exchanged about it,
3 we've had subpoena -- we've subpoenaed law firms and third
4 parties who've objected based on privilege. So yes, to answer
5 your question, if there's an objection based on privilege, we
6 think the issue is ripe immediately.

7 And if the problem is a desire to have more time to
8 brief privilege, and the problem is we suggest a ten-day and
9 five-day reply for briefing on motions to compel, on privilege,
10 if the thought is this is too difficult an issue to brief that
11 quickly, we could carve out a different schedule for briefing
12 privilege under the normal rules. That is a bigger issue. I
13 just want the ability, after I get an objection, and I know I'm
14 not going to get a document or a series of documents, to be
15 able to move after a discovery conference; not have to wait
16 until the middle of December.

17 THE COURT: Okay. I understand the point. Do you
18 want to respond?

19 MR. TECCE: Briefly, Your Honor. First of all, Your
20 Honor, the December dates with respect to when Barclays would
21 receive written responses and objections relate to one document
22 request. The balance of the document requests will be
23 responded to on the 16th of November, and that's when written
24 responses and objections would be provided. Typically, we
25 would have thirty days to provide written responses and

1 objections. We've actually agreed with Barclays that we'll
2 submit written responses and objections in twenty days, not
3 thirty days. So they're getting written responses and
4 objections earlier.

5 I'm not advocating that to the extent there's a
6 dispute about a category, a subject matter of documents, for
7 example, date -- we will not produce documents after a certain
8 date; we will not produce documents concerning a certain aspect
9 of the transaction -- I'm not advocating that Barclays wait to
10 get those documents to actually move to compel. They will have
11 written responses and objections that indicate we won't produce
12 a certain category of documents, and they can proceed.

13 But privilege, Your Honor, is a different issue. And
14 that is something that needs to be treated differently, from
15 the standard run-of-the-mill objection. The issue is not when
16 Barclays gets written responses and objections; because I
17 advised them on Monday, and I'm telling them now, that we will
18 not agree that by filing the Rule 60(b) motions we have waived
19 attorney-client privilege. We don't agree to that. So they
20 know that today. And it's not a question of how much time --
21 although I think it's a very complicated issue and one that
22 does require extensive briefing, given the sensitive nature and
23 the drastic relief that's requested, yes it's something that
24 needs to be briefed.

25 The issue is, it would be briefed in a vacuum. It

1 would be briefed in the hypothetical sense. Because there's
2 not a single document that anybody would be looking at to
3 determine whether the privilege has been waived. So with
4 respect to requests for privileged documents, and there are
5 many subpoenas to law firms, subpoenas to the committee, there
6 are many -- with respect to privilege, we think that there
7 should not be motions to compel until the documents have
8 actually been produced and a log has been provided, so that the
9 motion to compel can be analyzed within that context.

10 And considering that with respect to the majority of
11 the document requests, the responses will be coming in
12 November; with respect to one document request that was served
13 later, the responses will be coming in December; Barclays won't
14 be prejudiced by that, because they can take that fight up at
15 that time.

16 THE COURT: I'm a little confused. And it mostly
17 relates to your opening statement to the effect that there is
18 this threshold legal issue as to whether the filing of the
19 60(b) motion itself --

20 MR. TECCE: Oh, no.

21 THE COURT: -- effected a waiver. Did I misunderstand
22 you?

23 MR. TECCE: Your Honor, I think you did. It's not --
24 as I understand Barclays' position, it's not because we filed
25 the Rule 60(b) motion. It's because of certain arguments that

1 we make in the Rule 60(b) motion that purport to involve
2 conversations between committee and its counsel, although we
3 don't mention any conversations between committee and its
4 counsel in our motion. Our motion does reference conversations
5 between the committee's financial advisor and Barclays, and it
6 does discuss, at certain points, the committee's understanding.

7 I suppose that Barclays derives from that that it has
8 put privileged communications at issue. I would disagree with
9 that completely. And our motion does not rely on
10 communications between attorney and the committee. And I think
11 what Barclays is saying is that there is a line of cases out
12 there that say that where your claim rests on communications
13 between attorney and client, you put attorney-client
14 communications at issue and you waive the privilege. That's as
15 I understand their argument.

16 I dispute that because we don't put attorney-client
17 communications between the committee and its advisors at issue
18 in our pleading. I dispute that. And I dispute the
19 applicability of the doctrine.

20 THE COURT: Well, let's just -- without getting into
21 whether or not statements made in your 60(b) motion did or did
22 not rise to the level of giving Barclays the ability to make
23 the argument that there has been a waiver of privilege, let's
24 just assume for the sake of the conversation we're now having,
25 that Barclays wants to assert that position.

1 MR. TECCE: Right.

2 THE COURT: And wants to assert that position in a
3 setting that has nothing to do with underlying documents --

4 MR. TECCE: Right.

5 THE COURT: -- but has everything to do with the
6 statements made in the publicly filed pleadings. In other
7 words, you said something which they say, oh, the door's open.

8 MR. TECCE: Right.

9 THE COURT: Isn't that what they're going to say? So
10 let's just say that's what they say.

11 MR. TECCE: Right.

12 THE COURT: That has nothing to do with whether or not
13 documents are delivered by any particular date. It's an issue
14 that appears to be -- whether it's easy to resolve or not, I
15 don't know -- but it appears to be unrelated to documents.

16 MR. TECCE: Well, I will -- I actually wouldn't agree
17 with that, Your Honor. It's not only is it unrelated to
18 documents, but how about deposition testimony? Meaning, the
19 statements -- the waiver, the issue of whether or not the
20 waiver has taken place by virtue of the arguments, that
21 decision should only be made within the context of what the
22 documents ultimately end up being at the end of the day. There
23 may be no documents, there may be a number of documents.

24 What's more, it becomes an issue with respect to what
25 witnesses will testify to in depositions and what they won't

1 testify to in depositions. So it's not something that can be
2 decided in a vacuum based on statements that are just simply
3 made in a pleading, because it's going to govern the scope of
4 the production of the documents and what's testified to at
5 depositions as well.

6 So I think it would be premature, based on what is in
7 a pleading, to litigate the issue of whether or not the
8 attorney-client privilege and the work product doctrine between
9 the creditors' committee and its advisors, has been waived for
10 any and all purposes in connection with the sale transaction.
11 To decide that issue before a single document had been produced
12 or logged, is simply premature.

13 And one final point, Your Honor. Our papers, our
14 position, do not necessarily mirror those of the other parties
15 to this dispute. We are not a party to any document that was
16 signed. We are not a party to the sale transaction documents.
17 The creditors' committee was not in existence at the time the
18 asset purchase agreement was negotiated and drafted. We are
19 not a party to any of those documents. So it's not an issue --
20 to the extent that other papers have raised the issue of what
21 people drafting documents knew, it just simply does not apply
22 to us. So if other parties reach agreements with Barclays,
23 that's fine, but that shouldn't be something that's negatively
24 construed against us.

25 THE COURT: Okay.

1 MR. TECCE: Thank you.

2 THE COURT: Mr. Hume is signaling that he just wants
3 to briefly comment.

4 MR. HUME: Very brief -- just two very brief points.
5 I think Your Honor is one hundred percent correct, and I should
6 have made it more clear. Our motion to compel on privilege, if
7 we file one, will not require any in camera review of a
8 document. It is not a motion about whether something's
9 privileged, it's a motion about whether the arguments they make
10 have waived the privilege. It is clearly ripe now.

11 And the only other point that I should have made is we
12 are spending a lot of time arguing about something that we
13 think is already provided for and required by the rules. If
14 you get an objection that says we're not producing X documents,
15 either because we think it's irrelevant, unduly burdensome or
16 privileged, it's ripe. You have to meet and confer, etcetera,
17 but it's ripe. We can move to compel. Arguably, we could have
18 left it out of the order and just done it. Given that we had
19 some disagreement, I wanted to be explicit, for better or for
20 worse.

21 THE COURT: Okay. Here's my disposition of this
22 relatively narrow issue. I believe that Barclays should have
23 the ability now, if it chooses to, to raise issues concerning
24 possible waiver of privilege or work product doctrine
25 protections on account of the statements made in the 60(b)

1 motion by the committee. But that is certainly without
2 prejudice to the arguments that may be made -- I expect will be
3 made -- by the committee, that it is premature to adjudicate
4 that dispute until after materials have been discovered and
5 turned over that might in fact be attorney-client privileged
6 documents effected by the waiver.

7 In effect, this is another examples of accelerating
8 into an early stage of the litigation procedures a matter
9 which, in the ordinary course of a contested matter or
10 adversary proceeding discovery, would simply come up as
11 appropriate. I don't think it makes good sense to prohibit
12 behavior that is otherwise permissible under the applicable
13 rules, simply by virtue of putting it into a pretrial order.

14 Whether or not a filed motion by Barclays for a
15 determination on privilege would even be ruled on before the
16 discovery deadline for documents, is a matter that I can't even
17 begin to comment on. Having been through a similar debate in
18 an adversary proceeding in this case that actually involves
19 Barclays, I recognize that this is a very difficult issue.

20 In the adversary proceeding, which I believe has been
21 settled, American Express v. Barclays, issues were raised
22 concerning potential waiver of the attorney-client privilege,
23 on account of certain statements that appeared in an affidavit
24 given by a partner in a respected law firm. That issue took
25 time, was distracting, and frankly, didn't speed things up, it

1 slowed things down. So for someone who is an advocate of
2 expedition, an early motion on the issue of waiver of
3 privilege, may actually have the opposite effect. But I'm
4 certainly not going to restrain it.

5 The consequences of filing that motion will be what it
6 is, presumably a response that says I shouldn't rule on it. So
7 I think that the parties are probably better served by active
8 meeting and conferring sessions that might lead to consensual
9 resolutions of disputes of this sort, as opposed to pulling the
10 trigger quickly. But you have the right to pull the trigger,
11 should you choose to do it.

12 Assuming you understand what I said, the order should
13 be modified in a manner consistent with Barclays' view, coupled
14 with the admonition that it may not be good practice to do what
15 they want to do.

16 MR. TECCE: Just a clarification question, Your Honor.
17 Barclays' position -- I don't want to take away anything that
18 they were just awarded -- but I think their position was that
19 they could file at the time we submitted our written responses
20 an objection. I just want to clarify, I think Your Honor is
21 going beyond that.

22 THE COURT: My position is that based on the argument,
23 they can file whatever discovery motion is permissible under
24 the rules, assuming that discovery motion suppression
25 procedures have been followed. Discovery motion suppression

1 procedures include meet and confer sessions. As a result of
2 the argument, and it may have been an unintended consequence of
3 the argument, I recognize that there is another element in the
4 Barclays position that has nothing to do with responses to
5 discovery, and has to do instead with the argument -- and I
6 take no position on this subject in terms of the merits of
7 it -- that the contents of the 60(b) motion of the committee
8 may have effected a waiver of privilege. That has nothing to
9 do with discovery timetables. It has nothing to do with when a
10 response is made. It has to do with whether or not as to all
11 discovery, there has been, perhaps an unintentional waiver, but
12 a waiver nonetheless of the attorney-client privilege.

13 What I said before still goes. It's fair game.
14 Whether it's a good thing to do is another story altogether.
15 And by the way, it would have been fair game regardless of
16 anything that was stated in the proposed order. Presumably, if
17 there had been no order, Barclays would still have the ability
18 tomorrow to file a motion saying gotcha.

19 MR. HUME: Understood, Your Honor. We'll take those
20 comments to heart. The one thing that I'm not clear on is we
21 do ask in our proposal for expedited briefing, whether a
22 response would be due ten days after the motion and a reply
23 five days after that.

24 THE COURT: I don't choose to get involved in
25 micromanaging your briefing schedule. I think that the parties

1 should try to reach an agreement as to what makes sense on
2 that. And please recognize that just because you put yourself
3 under the gun, doesn't mean that I'm under the gun. So it may
4 be just as well for you to take the time that you need to do it
5 without losing a lot of weekends. Inhumane behavior doesn't
6 make a lawyer better. I think that the fact that you stay up
7 all night is a shame. And there should be nothing about this
8 schedule that forces that.

9 MR. HUME: I appreciate that being on the record, Your
10 Honor. We'll get that to our clients.

11 THE COURT: I didn't actually say that you personally
12 stayed up all night, but I recognize that lawyers in this Court
13 who appear alert, do so without a lot of sleep, very
14 frequently.

15 Is there more for this hearing?

16 MR. GAFFEY: I think we've resolved everything else,
17 Your Honor. I don't think we have anything else that we need
18 to --

19 THE COURT: Okay.

20 MR. GAFFEY: -- have Your Honor resolve for us.

21 THE COURT: Then we're adjourned until next time.

22 MR. GAFFEY: Thank you, Your Honor.

23 THE COURT: Thank you.

24 (Proceedings concluded at 2:52 p.m.)
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RULINGS

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hearing and/or argument

set by the Court

Barclays may submit an	37	22
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order to compel

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Penina Wolicki

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Date: October 19, 2008